Office-Supreme Court, U.S.
FILED
MAY 27 1981
ALEXANDER L. STEVAS,
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80-2050

AMENDED
APPENDIX TO PETITION
FOR
WRIT OF CERTIORARI

UNITED STATES of America,
Plaintiff-Appellee,

v.

34.60 ACRES OF LAND, MORE OR LESS, IN the COUNTY OF CAMDEN, State of Georgia, Elinor T. Giobbi et al, etc., Defendants,

Sarah T. Van Cleve and Robert B. Van Cleve,
Defendants-Appellants.

No. 79-1342
Summary Calendar.

United States Court of Appeals,
Fifth Circuit
Unit B

April 15, 1981.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, TJOFLAT and VANCE, Circuit Judges.

PER CURIAM:

This appeal arises from a condemnation suit brought by the Unites States against several acres of land on Cumberland Island for the establishment of the Cumberland Island National Seashore under 16 U.S.C.A. §§ 459i et seq. Under that statute, Congress provided that landowners meeting certain conditions could by agreement donate their property

to the National Park Foundation and retain a life estate. The landowner appellants here contest the right of the Government to condemn their property because, they contend, they offered to donate their property under the statute, but were improperly refused. As an alternative proposition presented on appeal but not to the trial court, appellants contend the Government could not, consistent with due process and equal protection, condemn the property without first contacting them about the availability of the donative alternative to condemnation. Finding no issue of fact, the district court granted summary judgment against appellants' claim they made a timely offer to donate their property to the National Park Foundation. We affirm.

[1] The United States asserted that the landowners had not made any offer to the National Park Foundation prior to January 1, 1973 the cut-off date in the statute. Affidavits were submitted demonstrating the Foundation had no record whatsoever of any offer, written or oral, from the appellants. This evidence would have been admissible at trial, Fed. R.Evid. 803(7), and is "frequently the only way in which a negative fact may be proved." McClanahan v. United States, 292 F.2d 630, 637 (5th Cir.), cert. denied, 368 U.S. 913, 82 S.Ct. 193, 7 L.Ed.2d 130 (1961) (citations omitted).

In response, the appellants relied upon repetition of the unverified allegation contained in their answer, neither submitting their own affidavit nor suggesting other evidence that would show either one of them had made an offer to the Foundation prior to January 1, 1973. The law is clear that a party cannot rest on the allegations contained in his pleading in opposition to a properly supported

summary judgment motion made against him. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 1593, 20 L.Ed2d 569 (1968). Appellants did submit an affidavit of a relative indicating that a retired Park Service employee had made the following statement:

> About the summer of 1972, the Van Cleves said they wanted to make a deal with the National Park Foundation to stay on Cumberland, but I advised them that the Foundation had been dealing only with owners of large tracts and that they did not have a chance as the house was built after the cut-off date specified in the bill.

Appellants submitted the affidavit "merely as evidence as to [their] intent early on to deal with the National Park Foundation-not as evidence of the offer." Brief for Appellant at 11 (emphasis in the original). Viewed in the light most favorable to appellants with all reasonable doubt resolved in their favor, Poljer v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed2d 458 (1962), Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135 (5th Cir. 1973), such an affidavit is not evidence of an offer of the appellants' property to the Foundation. On this record, the district court properly determined there was no genuine issue of fact and granted summary judgment for the United States.

[2-4] Appellants argue an issue not raised or argued to the district court: that the National Park Foundation had a duty, dictated by due process and equal protection considerations, to approach small landowners as well as large landowners and inform them that a life estate might be retained through a donative agreement with the Foundation.

Generally, we do not consider issues not raised in the district court. Noritake Co., Inc. v. M/V HELLENIC CHAMPION, 627 F.2d 724, 732 (5th Cir. 1980). In any event, however, the landowners have failed to demonstrate any injury from the alleged breach of duty. The landowners claim they made an offer to donate. Such an assertion shows they were aware of their rights under the statute. They can claim no injury from any failure of the Government to publicize such rights. Cf. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), cert. denied, 415 U.S. 914, 94 S.Ct. 1410, 39 L.Ed.2d 468 (1974) (a party must show that he has suffered some direct and personal injury resulting from the violation of a right designed to protect that party).

AFFIRMED.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA,	*	CIVIL ACTION
VS.	*	NO. 277-20
34.60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOBBI, et al., AND UNKNOWN DEFENDANTS	*	U.S. District Court, Southern District of Ga. Filed in office 5:00 p.m. 11-10-78 /s/Lyneda T. Thomas Deputy Clerk

ORDER

In the above-styled condemnation action, the Government moves to strike all defenses in paragraphs 2(a), 2(b), 2(c), and 2(d) of the answers filed by defendants, Van Cleves, Potterfield and Read, as well as the defenses in paragraph 2(e) of the Van Cleves' answer. Alternatively, the Government moves for summary judgment on these defenses. The defendants' land is being taken pursuant to 16 U.S.C. §§ 459i through 459i-9, creating

the Cumberland Island National Seashore.

In paragraph 2(a) of each answer, the landowners state that the Government cannot take their land without first having complied with "conditions precedent established by the Environmental Protection Agency." The landowners cite no such "conditions precedent," and the Court is satisfied that none exists. Construing this defense as an allegation of the Government's non-compliance with the National Evironmental Policy Act, 42 U. S.C. § 4321 et seq., the motion to strike will be granted. Since this defense does not question whether the land is being taken for a congressionally authorized public use, it is not a sufficient defense to the taking. See United States v. 416.81 Acres of Land, 514 F. 2d 627, 631 (7th Cir. 1975); United States v. 255.25 Acres of Land, 553 F.2d 571, 572 n.2 (8th Cir. 1977). See also United States v. 178.15 Acres of Land, 543 F.2d 1391

(4th Cir. 1976).

Paragraph 2(b) of each answer challenges the authority of the Government to condemn land on Cumberland Island. The motion for summary judgment will be granted as to this defense. It is clear that the takings are congressionally authorized. See 16 U.S.C. § 459i-1 and 40 U.S. C. §257.

In paragraph 2(c) of the answers filed by the Potterfields and Reads, and paragraph 2(d) of the answer filed by the Van Cleves, the landowners allege that the Government has not condemned all privately owned property on Cumberland Island, but has arbitrarily and capriciously selected their land for condemnation, in violation of their rights under the Fifth Amendment. The Court construes these defenses as alleging a denial of equal protection, and based upon the record, summary judgment will be granted for the Government on

on these defenses. The Government has shown to the exclusion of all genuine issues of fact that it did not act arbitrarily in deciding to condemn the defendants' land, and that in this regard, the defendants have not without reason been treated differently from others similarly situated. The case at bar and the numerous other condemnation actions which are now pending in this Court involving the Cumberland Island National Seashore, attest to the fact that the Government has condemned many tracts of land on Cumberland Island.

The Court construes paragraph 2(c) of the Van Cleves' answer as a claim that under 16 U.S.C. § 459i-3, they are entitled to retain a right of use and occupancy in their house.[1]

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[1] 16 U.S.C. §459i-3 provides in relevant part:

"(a) With the exception of any property deemed necessary by the Secretary for visitor facilities or administration of the seashore, any owner or owners of

improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the property for noncommercial residential purposes, for twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later. . . "****"(c) The term "improved property", as used in this section shall mean a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 (hereinafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated."

The Van Cleves allege in paragraph 2(c) that they erected their residence on the tract in question "prior to the enactment of Public Law 92-536" creating the Cumberland Island National Seashore (October 23, 1972). However, the relevant date in this respect is February 1, 1970. 16 U.S.C. § 459i-3(c). The defendants conceded at the pretrial hearing of August 8, 1978, that construction

was not begun on their dwelling before February 1, 1970. Accordingly, the Government's motion for summary judgment is granted as to this defense.

In paragraph 2(e) of their answer, the Van Cleves allege that pursuant to the last clause of 16 U.S.C. § 459i-3(a), and prior to January 1, 1973, they offered to donate their land to the National Park Foundation, conditioned on their retention of a life estate in the land.[2] The Foundation is said to have rejected this offer, while accepting identical offers from similarly situated landowners on Cumberland Island. The Van Cleves

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[2] The last clause of 16 U.S.C. § 459i-3(a) states:
"Provided further, That when acquiring lands, waters, and interests therein from the National Park Foundation, its successors and assigns, the Secretary shall acquire such lands, waters, and interests subject to the written terms and conditions contained in those transactions, including but not limited to options, entered into by the National Park Foundation prior to January 1, 1973, and that such previous written rights and interests shall prevail over provisions of this subsection."

allege, in effect, that the National Park Foundation should have accepted their offer, and it is clear that if it had done so, the Government could not take their retained life estate, 16 U.S.C. §459i-3(a). Thus, the Court cannot conclude that this defense is insufficient.

Of course, the National Park Foundation is not required to accept all donation offers, 16 U.S.C. § 19g. Here, the Foundation's decision to accept or reject an offer could determine whether a landowner will be able to retain any interest in his land, and in this situation, the Foundation could not arbitrarily and purposefully discriminate against one landowner by rejecting his offer, while accepting identical offers from other landowners. Compare Snowden v. Hughes, 321 U.S. 1 (1944).

The Government argues that the Foundation is a charitable and non-profit corporation, 16

U.S.C. § 19e, and cannot properly be characterized as an agency or arm of the Department of the Interior. The Court agrees, but concludes that the strictures of the Fifth Amendment are applicable. The National Park Foundation was created by an Act of Congress for the sole purpose of encouraging gifts of real and personal property to the National Park Service, 16 U.S.C. § 19e. The Foundation may utilize the services and facilities of the Department of Interior and Department of Justice without reimbursement, 16 U.S. C. § 19h, and contributions, gifts, or transfers to the Foundation are regarded as contributions, gifts, or transfers to the United States, 16 U.S.C. § 191. The Foundation is required to report to Congress at the end of each fiscal year, 16 U.S. C. § 19n.

It is obvious that the National Park Foundation was designed to function in close concert

with the National Park Service, and the two are closely entwined. Accordingly, the Court concludes that the Foundation is subject to the strictures of the Fifth Amendment when it exercises its discretion to accept or reject a donation offer. Compare Smith v. Young Men's Christian Association of Montgomery, Inc., 462 F.2d 634 (5th Cir. 1972); Duriso v. K-Mart No. 4195, Division of S. S. Kresge Co., 559 F.2d 1274 (5th Cir. 1977). In this context, the Constitution requires only that the Foundation act rationally and that it not act in an arbitrarily discriminatory manner. The Foundation is not required to accept all donation offers. To be entitled to summary judgment, the government must show either that the Van Cleves made no offer prior to January 1, 1973, or that the Foundation acted rationally in refusing the alleged offer.

The Court concludes that the Government

has not met its burden on the motion for summary judgment. It has shown that the Foundation never received a written offer to donate from the Van Cleves, and that such offers are customarily made in writing. See Affidavit of John L. Bryant, Jr., President of the National Park Foundation. Defendants allege that they did offer to donate their land and dwelling to the Foundation, conditioned on their retention of the land for life, or for twenty-five years. The Foundation is said to have refused even to discuss the matter. Defendants do not allege that they made a written offer to the Foundation, and the Government has not shown that donation offers are required by law to be in writing. No such requirement appears in the legislation creating the National Park Foundation 16 U.S.C. § 19e, et seq., or in 16 U.S.C. §459i-3. The Government has not shown to the exclusion of all genuine issues of material

fact that the Van Cleves did not offer to donate their land to the Foundation prior to January 1, 1973. Compare Adickes v. S. H. Kress & Co., 398 U. S. 144, 159-161 (1970).

Nor has the Government shown why the alleged offer was rejected. On this record, the Government is not entitled to summary judgment on paragraph 2(e) of the Van Cleves' complaint.

Paragraph 2(d) of the answers filed by defendants, Potterfield and Read, alleges that as a "condition precedent" to the plaintiff's right to take their land, it must engage with them in "good faith settlement negotiations." The defendants allege that the Government has failed to do this. The motion to strike will be granted as to these defenses. See 42 U.S.C. §§ 4651 and 4602 (a).

In sum, as to the answers filed by defendants, Potterfield and Read, the Government's motion to strike is granted as to paragraphs 2(a) and 2(d),

and its motion for summary judgment is granted as to paragraphs 2(b) and 2(c). Turning to the answer filed by the Van Cleves, the motion to strike is granted as to paragraph 2(a), and the motion for summary judgment is granted as to paragraphs 2(b), 2(c), and 2(d). The Government's motions are denied as to paragraph 2(e) of the Van Cleves' answer.

So Ordered, this 10th day of November, 1978.

/s/ Anthony A. Alaimo
Chief Judge, United States District Court, Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	*	CIVIL ACTION
Plaintiffs	*	NO. 277-20
VS	*	U. S. District Court, Southern
34.60 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF CAMDEN, STATE OF GEORGIA, ELINOR T. GIOBBI, ET AL., AND UNKNOWN DEFENDANTS,	*	District of Ga. Filed in office 10:25 a.m. Nov. 29, 1978 /s/ H. R. Crumley
Defendants	*	Deputy Clerk

ORDER

The above-styled action is presently before the Court on the government's motion for reconsideration of that position of the Court's Order of November 10, 1978, which denied the government's motion to strike and alternative motion for summary judgment as to paragraph 2(e) of the answer filed by the Van Cleves.

The government has now shown that the Van

Cleves made no oral or written donation offer to the National Park Foundation prior to January 1, 1973. See 16 U.S.C. § 459i-3; Affidavit of John L. Bryant, Jr., President of the National Park Foundation.

The condemnees have failed to set forth any facts showing that there is a genuine issue for trial on this crucial point. See Rule 56(e), Fed. R. Civ. P. In fact, the affidavit filed by the Van Cleves supports the government's proof to the effect that these landowners never approached the National Park Foundation with an offer to donate. Accordingly, the government's motion for reconsideration is hereby granted. Summary judgment is granted for the government on paragraph 2(e) of the Van Cleves' answer.

So Ordered, this 29th day of November, 1978.

/s/ Anthony A. Alaimo
Chief Judge, United States
District Court, Southern
District of Georgia

GOVERNMENT
EXHIBIT
A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. CV277-20
34.60 ACRES OF LAND, MORE	)	
OR LESS, IN THE COUNTY OF	)	TRACT NO.: 02-165,
CAMDEN, STATE OF GEORGIA	)	formerly 02-127
ELINOR T. GIOBBI, ET AL.,	)	(Robert B. Van Cleve,
AND UNKNOWN DEFENDANTS,	)	et ux)
	)	
Defendants.	)	

A F F I D A V I T

Affiant, John L. Bryant, Jr., being first duly sworn, deposes and states as follows:

1. Affiant is the President of the National Park Foundation, a non-profit, charitable, tax-exempt foundation chartered by the United States Congress in 1967 under Public Law 90-209 for the purpose of encouraging private gifts of real and personal property for the benefit of the National Park Service. Offers to donate real

property are made in writing for consideration by The Foundation.

2. As President of the National Park Foundation, affiant has custody, care, control and access to all of the original records and correspondence files of the said Foundation;

3. Affiant has caused a diligent search of the records and correspondence files of The National Park Foundation to be made with reference to an alleged offer by the defendants, Robert B. Van Cleve (a/k/a Robert Baldwin Van Cleve) and Sarah T. Van Cleve, his wife, to give and donate property owned by them on Cumberland Island, Camden County, Georgia, to the said Foundation;

4. As a result of said search of the records and correspondence files of the said Foundation, affiant states that there is no correspondence of any kind or import in its files from the defendants, Robert B. Van Cleve and Sarah T. Van Cleve, to The National Park Foundation;

5. Further, affiant sayeth not.

/s/ John L. Bryant, Jr.
John L. Bryant, Jr.

S E A L

Subscribed to and sworn before me
this 25th day of September, 1978.
Notary Public ELEANOR K. RESIR
My commission expires: May 14, 1982

GOVERNMENT
EXHIBIT
A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. CV277-20
34.60 ACRES OF LAND, MORE	)	
OR LESS, IN THE COUNTY OF	)	TRACT NO.: 02-165,
CAMDEN, STATE OF GEORGIA	)	formerly 02-127
ELINOR T. GIOBBI, ET AL.,	)	(Robert B. Van Cleve,
AND UNKNOWN DEFENDANTS,	)	et ux)
	)	
Defendants.	)	

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4. As a result of said search of the records and correspondence files of the said Foundation, affiant states that there is no memoranda, notations or any other evidence in said files reflecting any offer, written or oral, from the defendants, Robert B. Van Cleve and Sarah T. Van Cleve, to the National Park Foundation;

5. This affidavit supplements affiant's

previous affidavit given by him in this cause on this matter.

6. Further, affiant sayeth not.

/s/ John L. Bryant, Jr.
John L. Bryant, Jr.

S E A L

Subscribed to and sworn before me
this 25th day of September, 1978.

Notary Public ELEANOR K. RESIR

My commission expires: May 14, 1982

Respectfully submitted,
Sarah T. Van Cleve